IN THE COURT OF APPEALS FOR THE STATE OF WASHINGTON

STATE OF WASHINGTON,	)	
	)	No. 56402-1-I
Respondent,	)	
	)	**DIVISION ONE**
v.	)	
	)	UNPUBLISHED OPINION
PHILIP ARTHUR BURNS**,**	)	
	)	
Appellant.	)	FILED: August 21, 2006
	)	

Per Curiam — Generally, the trial court has authority to correct an invalid sentence at any time if the invalidity is apparent on the face of the judgment and sentence. In this case, the trial court's failure to impose a term of community custody as required by statute was apparent on the face of the judgment and sentence. Accordingly, the trial court did not err in correcting Philip Burns' sentence to include the required term of community custody.

FACTS

On June 22, 2001, appellant Philip Burns pleaded guilty to one count of felony violation of a domestic violence no contact order, one count of intimidating a witness, and one count of second degree possession of stolen property. At sentencing, consistent with the recommendations of the parties, the trial court imposed concurrent standard-range terms, the longest of which was 89 months for the intimidating a witness conviction. The court also informed Burns that he would be serving 18 months of community custody after his release from confinement "on those counts." The judgment and sentence specified a term of community custody only for count I (felony violation of a no contact order).

By letter dated April 13, 2005, the Department of Corrections (DOC) notified the trial court that a community custody term was also required for Burns' conviction for intimidating a witness (Count II). <u>See former</u> RCW 9.94A.120(11)(a). The State eventually noted a motion to amend the judgment and sentence, arguing that the trial court had authority to correct a "clerical mistake" under CrR 7.8(a). Burns objected, arguing that any effort to amend the judgment and sentence was untimely. Following a hearing on June 7, 2005, the trial court concluded that its failure to include the statutorily required term of community custody was not a "clerical mistake," but that the circumstances warranted relief under CrR 7.8(b)(5).

DECISION

On appeal, Burns contends the trial court had no authority to correct his sentence nearly four years after its imposition. He reasons that the State waived any challenge to the sentence because it did not file a timely appeal, <u>see</u> RAP 5.2(a) (State may appeal sentence within 30 days of entry), and that the sole basis for DOC's challenge was RCW 9.94A.585(7), which required DOC to file any challenge within 90 days of learning the actual terms of his sentence. See also RAP 16.18(b) (DOC has 90 days after receiving notice of sentence to file post-sentence petition). But contrary to Burns' suggestion, these provisions do not comprise the sole authority for correction of a judgment.

The trial court retains the power and duty to correct an invalid sentence when the invalidity is apparent on the face of the judgment and sentence. See State v. Smissaert, 103 Wn.2d 636, 639, 694 P.2d 654 (1985); see also In re Personal Restraint of Goodwin, 146 Wn.2d 861, 866, 50 P.3d 618 (2002); RCW 10.73.090 (one-year time bar does not apply to judgment and sentence that is invalid on its face); McNutt v. Delmore, 47 Wn.2d 563, 565, 288 P.2d 848 (1955) ("When a sentence has been imposed for which there is no authority in law, the trial court has the power and duty to correct the erroneous sentence, when the error is discovered"). (emphasis added). Sentencing provisions outside of the authority of the trial court are "illegal" or "invalid." Smissaert, 103 Wn.2d at 639. Burns does not dispute the State's assertion that the sentencing error in this case was apparent on the face of the judgment and sentence.

The facts in Smissaert are analogous. In Smissaert, a jury found the defendant guilty of murder, and the court sentenced him to a maximum term of 20 years in prison. The Board of Prison Terms and Paroles later notified the court that the relevant statute required a sentence of life imprisonment. Approximately two years after the initial sentencing, the trial court corrected the sentence to reflect the statutorily required term of life imprisonment. Smissaert, 103 Wn.2d at 638. In affirming the entry of a corrected sentence, our Supreme Court relied on the trial court's authority to correct an invalid sentence, even if the correction involved a more onerous judgment. Smissaert. 103 Wn.2d at 639.

As Burns notes, Smissaert was decided before CrR 7.8 and RCW 9.94A.585(7). RCW 9.94A.585(7) created a limited procedure for DOC to challenge all errors of law in a sentence. But nothing in RCW 9.94A.585 purports to restrict the trial court's authority to correct a facially invalid sentence. CrR 7.8 does not govern the correction of legal errors, and the criminal rules are to be "interpreted and supplemented in light of the common law and the decisional law of this state." CrR 1.1.

Burns has not identified any authority suggesting that the general principle set forth in Smissaert is no longer good law. Nor has he identified any constitutional impediment to the trial court's correction of the erroneous sentence in this case. See State v. Traicoff, 93 Wn. App. 248, 255, 967 P.2d 1277 (1998) (the failure to appeal an erroneous term of community placement by the State or DOC does not vest the defendant with a legitimate expectation of finality in an erroneous term of community placement that the defendant has not yet begun to serve). The trial court's reliance on CrR 7.8(b)(5) is not controlling. See State v. Bobic, 140 Wn.2d 250, 258, 996 P.2d 610 (2000) (appellate court may affirm trial court ruling on any basis supported by the record).[1] The trial court did not err in correcting the invalid sentence.[2]

Affirmed.

For the court:

Appelwick, C.J.

Dwyer, J.

Agid, J.

[1] The trial court's reliance on CrR 7.8(b)(5), which authorizes vacation or modification of a judgment for "[a]ny other reason justifying relief," was misplaced. CrR 7.8(b)(5) does not apply when, as here, the circumstances justifying relief existed at the time the judgment was entered. State v. Klump, 80 Wn. App. 391, 397, 909 P.2d 317 (1996).

[2] In light of our decision, we do not address the State's contention that the trial court had authority to correct the omission as a "clerical error" under CrR 7.8(a).